STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 25, 2003
v	No. 238202 Wayne Circuit Court
TERRY L. JOHNSON, Defendant-Appellant.	LC No. 01-001635

Before: Neff, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Following a bench trial defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. Defendant was sentenced to serve a term of thirty-two to fifty years' imprisonment for his murder conviction, to be preceded by a five-year term for his conviction of felony-firearm. Defendant appeals as of right. We affirm.

As shown at trial, the events leading to the homicide at issue here began after defendant accompanied the victim's sister, Kimberly Baugh, home from a store. While outside Baugh's home defendant became involved in a physical altercation with Baugh's pre-teen-aged sons. After the boys retreated inside the home, defendant began kicking at the door to the house while screaming for Baugh's boyfriend, Harold Hopson, to come out and fight. Hopson responded by retrieving a .22 caliber rifle and firing at defendant from a window of the home. As defendant fled from the home down an alley, Hopson left the home and fired a second shot at defendant, who then yelled that he would "be back."

Fearing that defendant would indeed return, Hopson handed Baugh the rifle then left to purportedly borrow a car so that he could remove Baugh and the children from the home. After rounding up the children, Baugh, while still carrying the rifle, took the children to hide in an abandoned vehicle located in a field across from Baugh's home. Moments later, a few of the children noticed movement in the bushes at the edge of the field. At that same time, Baugh's brother, Dennis Rogers, emerged from a neighboring home and began running toward the vehicle where Baugh and the children were hiding. Rogers, who was carrying what turned out to be only a BB rifle, called out to Baugh and asked what was going on. Baugh responding by directing Rogers' attention to the area of movement in the bushes. As Rogers began to turn to his right to look toward the bushes, Baugh and at least two of the children witnessed defendant emerge from the bushes and, while pointing a shotgun in Rogers' direction, fire a single blast

from a distance of approximately thirty to forty feet. Rogers, who was struck by the blast across the right side of his face and chest, died a short time later.

Defendant first argues that the trial court erred in rejecting his claim of self-defense. We disagree. Although defendant raises this issue as one concerning "the great weight of the evidence," a trial court's findings of fact in a bench trial are reviewed for clear error. MCR 2.613(C); see also *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). Therefore, we will address defendant's great weight argument under the clearly erroneous standard.[1] A trial court's findings are considered to be clearly erroneous if, after a review of the entire record, we are left with the firm and definite conviction that a mistake was made. *Gistover*, *supra*.

To be successful, a claim of self-defense requires that the defendant acted with an honest and reasonable belief that deadly-force was imminently necessary to forestall death or serious bodily harm. *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995). Proof that a defendant's belief of imminent harm was not honest or reasonable is, therefore, sufficient to defeat a claim of self-defense. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). Because defendant did not testify, no direct evidence to support a subjective belief of harm was admitted at trial. The evidence that was admitted, however, indicates that defendant fired upon the victim from a distance of at least thirty feet at a time when no weapon was being pointed at him and before the victim had even completed a turn in defendant's direction. Given this evidence, and considering defendant's ominous warning before leaving and returning with a weapon, we do not conclude that the trial court clearly erred in finding that the killing was not committed in self-defense.[2]

Defendant also contends that the evidence presented at trial established, at most, that he was guilty of voluntary manslaughter. Again, we disagree.

Second-degree murder may be reduced to voluntary manslaughter when the circumstances surrounding the killing demonstrate that malice was negated by adequate provocation and the killing was committed under the influence of passion or hot blood before a reasonable time has passed for the blood to cool. *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995); *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991). Here, defendant asserts that he was sufficiently provoked by previously being shot at by Hopson and that the incident happened so quickly that he acted under the influence of hot blood. However, even assuming that being fired upon is sufficient to constitute adequate provocation, this is not a case in which the defendant was armed at the time of the alleged provocation and acted to use his weapon before common-sense and reason had opportunity to take hold of him. Although the

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[1] See also *DiFranco v Pickard*, 427 Mich 32, 59; 398 NW2d 896 (1986) (findings of fact in a bench trial will be affirmed if not clearly erroneous, but findings of fact in a jury trial will be affirmed unless against the great weight of the evidence).

[2] Because imperfect self-defense applies only where a defendant would otherwise have been entitled to a self-defense claim had he not been the initial aggressor, see *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992), we similarly do not conclude that the trial court erred in also rejecting defendant's assertion that, under the doctrine of imperfect self-defense, defendant was guilty of no greater offense than voluntary manslaughter.

record reflects that the time between defendant's leaving Baugh's home and returning with the shotgun was relatively short, a reasonable person could conclude that defendant nonetheless had time to take a second look before he acted. See, e.g., CJI2d 16.9(2) (the defendant must "have acted on impulse, without thinking twice, from passion instead of judgment"). Accordingly, the evidence does not support mitigating murder to voluntary manslaughter and the trial court did not clearly err in finding defendant guilty of second-degree murder.

We affirm.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly